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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 350

LOCAL UNION NO. 742, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not yet officially reported. The Board's decision and order (J.A. 78-96)[1] are reported at 157 NLRB 451.

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[1] "J.A." refers to the Joint Appendix filed in the court of appeals. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1967 (Pet. A1, A3). On May 29, 1967, the Chief Justice extended the time for filing a petition for certiorari to and including July 14, 1967. The petition was filed on July 11, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), and of the Administrative Procedure Act, as amended (60 Stat. 237, 5 U.S.C. 1001 *et seq.*) are set forth in the Appendix to the petition, at pp. A4-A7.

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the union caused the company to discriminate against an employee, in violation of Section 8(b)(2) and (1)(A) of the National Labor Relations Act.

2. Whether, in the circumstances of this case, the union was deprived of its right to be represented by counsel at the hearing before the Board.

STATEMENT

A. The Board's Findings of Fact

In July 1964, Robert L. Reinero, a millwright apprentice and member of Carpenters' Local 1235 of

Modesto, California, arrived in Decatur, Illinois, which is within the jurisdiction of Carpenters' Local 742, petitioner herein (J.A. 79, 92; 18-19, 36). The constitution of the United Brotherhood of Carpenters, which is binding on members of all Carpenters' locals (including those employed in supervisory positions), provides (J.A. 85, n. 7; 57, 58): "A member who desires to work in another jurisdiction and who does not wish to transfer membership, shall before going to work, secure a Working Permit in writing from the Local Union or District Council in the jurisdiction where work is secured." Reinero paid John Foreman, petitioner's financial secretary and business representative, Local 742's fee for a 30-day working permit (J.A. 79, 92; 19-20, 38). Foreman first dispatched Reinero to a two-week construction job, and then to a construction job with the J. L. Simmons Company (the "Company") (J.A. 80, 92; 19-21). Company Foreman Lloyd Robbins found Reinero a "good worker" who "could do any kind of work" and did well on the job (J.A. 80; 12-13).

Business Agent Foreman had dispatched Reinero to the Company as a second-year apprentice because this was the rating marked in his dues book, which Foreman had received from Reinero's California local (J.A. 80; 20-21, 28). Reinero contended that this record was in error, and that he was entitled to the status and pay of a third-year apprentice (J.A. 80; 21, 28, 41). In an attempt to raise his classification, Reinero initiated correspondence involving both Foreman and his home local (J.A. 80; 70-77).

In early September, Foreman told Reinero to report at apprenticeship evening classes which were to be given at the union hall (J.A. 81, 92; 22). Reinero reported for the first of these, but the class was called off (J.A. 81, 92; 22). He promised his instructor that he would attend the second, but later that day received an overtime assignment from the Company which prevented his attendance (J.A. 81, 92; 12-13, 22-23). Early the following morning, he went to the union hall to explain his absence to Foreman (J.A. 81, 92; 23, 34). Upon seeing Reinero, Foreman became indignant. He accused Reinero, of "trying to get something over" on him (*ibid.*). Reinero tried to explain, but Foreman cut short the conversation. He said, "Well, you can work until your permit expires and then you are through. You won't be able to work here any more, so just get out" (J.A. 81, 93; 23).

Reinero went to the Company's job site and told Union Steward Clark and Foreman Robbins (a Brotherhood member) that Business Agent Foreman had said he would not sell Reinero a new work permit (J.A. 82, 93; 12-13, 11, 7). Both Clark and Robbins, in the presence of each other, told Reinero that he would not be able to work without a work permit (J.A. 92, 82; 24). Robbins urged Reinero to try again after Foreman had "cooled off" (J.A. 24, 11). After Reinero left, Clark and Robbins discussed the matter. At the Board hearing Robbins testified, respecting their conversation, that "we know" that the Company could not work Reinero without a work

permit, and that, although Clark said "very little" about Reinero specifically, "these things don't have to be said in words, they are understood more or less * * * we as union people know these things" (J.A. 94, 11).[2] Robbins also testified that, as an active union member, he did his "best" to abide by all provisions of the constitution and rules of the United Brotherhood of Carpenters, including the requirements that foremen comply therewith and that carpenters working outside their home local's jurisdiction obtain work permits (J.A. 85, n. 6; 8, 57, 58). He added that it was "up to the steward to see that that is enforced. The steward clears the man. * * * The man will ask the steward and show that he is cleared, and when he is cleared, then he goes to work" (J.A. 9-10).

After the October 1 conversation with Clark and Robbins about his work permit, Reinero consulted Raymond Davis, an official of the Bureau of Apprenticeship and Training, U.S. Department of Labor (J.A. 82; 10, 24, 25). While Reinero was in his office, Davis telephoned Business Agent Foreman to ask him about the problem which Reinero had raised regarding his apprenticeship status (J.A. 82; 10, 25-26).

On October 8 Reinero's work permit expired (J.A. 82, 93; 24). The next morning, while he stood in line

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[2] Robbins added that Reinero had to have "a permit to work in this area" because he came from "a different local" (J.A. 9).

at the union hall with his renewal permit fee in hand, Foreman called out, "Put your money away. It is no good here any more" (J.A. 82; 25). He also rebuked Reinero for "monkeying around with the Federal Government," adding, "The problem you had was between you and I. What did you go to see Davis for?" (J.A. 82; 25, 28-29). Foreman told Reinero that he should work out his problems in the local union and "not run to the Federal Agency to straighten out your problems." He added, "You have now got * * * yourself in a position where you are not only trying to dictate or operate the apprenticeship program, you are now getting in the position to dictate the policy for the local union. * * * You have violated every rule in the Brotherhood * * *" (J.A. 34), and further stated, "[Y]ou are through in my jurisdiction over here. Just go out to the job, get your tools and get out" (J.A. 83, 93; 25).[3]

Reinero went to the job site and found Company Foreman Robbins and Union Steward Clark. He informed them that Business Agent Foreman had refused to sell him the new work permit and had told him he could not work any more. Clark said, "Junior, I don't have anything against you but you know I can't let you work, don't you?" Robbins commented, "That's right, you need a work permit" (J.A. 83,

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[3] Foreman explained at the Board hearing that, by seeking redress outside the Brotherhood, Reinero had breached a "manly principle in violation of our Brotherhood. * * * I say he is a renegade now and I do mean he is a renegade * * *" (J.A. 83-84; 34-35).

93, 94, n. 3; 25, 12).[4] Robbins then took Reinero to Superintendent Mowers, who, like Robbins, was an active member of the Brotherhood (J.A. 84; 37). Robbins explained that Reinero had been unable to get a new work permit (J.A. 83, 93; 26). Mowers wrote out and handed Reinero a check for the wages due him (*ibid.*) Robbins "encouraged" Reinero to "keep trying," to "try to get this work permit so [he] could come back to work" (J.A. 26).

B. The Board's Conclusions and Order

The Board found there was an understanding between petitioner and the Company whereby non-members of petitioner could be employed only if they obtained a work permit from petitioner; and that, pursuant to this understanding, petitioner, through its agents, caused the Company to terminate Reinero's employment solely because he no longer had such a permit. The Board concluded that petitioner thereby discriminated against Reinero, in violation of Section 8(b)(2) and (1)(A) of the Act (J.A. 93-94, 85-86).[5] Finding that petitioner had elected to

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[4] At the Board hearing Robbins testified as follows (J.A. 83, n. 3, 94, n. 3; 12):

> Q. Did you tell him [Reinero] that if he got his work permit he could have a job?
> A. Yes.
> Q. The only reason he couldn't have his job was the failure to obtain a work permit through the Local, is that correct?
> A. Well, I think that is understood, yes.

[5] The Board further held that, independently of any such understanding, petitioner had unlawfully caused Reinero to be

be represented at the hearing by Business Agent Foreman rather than by an attorney, the Board rejected petitioner's contention that the absence of counsel deprived it of a fair hearing (J.A. 91, n. 2).

The Board ordered petitioner to cease and desist from the unfair labor practices found, to make Reinero whole for any loss of earnings, to notify the Company and Reinero that it has no objection to his employment, and to post appropriate notices (J.A. 87-91, 96).

C. The Decision of the Court of Appeals

In a *per curiam* opinion, the court of appeals concluded that the evidence justified the Board's findings that Reinero was required by an understanding between petitioner and the Company to have a work permit to keep his job; that petitioner's refusal to renew his permit caused his discharge; and that this would not have occurred had Reinero been a member of, or held a permit issued by, petitioner (Pet. App. A2). The court below further found that petitioner was not denied counsel, but had chosen to be represented by its business agent. Accordingly, the court of appeals enforced the Board's order (Pet. App. A3).

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discharged, for, when Union Steward Clark told Reinero in the presence of Company Foreman Robbins that Clark could not let Reinero work without a permit, this was tantamount to a direction to the Company to discharge Reinero because he no longer had a permit (J.A. 94-95).

ARGUMENT

1. There is no substance to petitioner's contention (Pet. 15-19) that the Board's unfair labor practice finding rests on the premise that a union-employer agreement which conditions employment on the acquisition of a work permit is *per se* illegal under the Act. The Board found, and the court of appeals concluded that the record supported its finding, that the hiring arrangement between petitioner and the Company discriminated against non-members of petitioner, *i.e.*, non-members had to obtain a work permit as a condition of obtaining employment, but members could obtain jobs without such a permit. Moreover, the record shows (*supra*, pp. 4-8) that Reinero, who was an accredited apprentice millwright, had his employment with the Company terminated solely because petitioner's business agent had failed to renew his permit.[6] In these circumstances, the Board was warranted in concluding that Reinero was treated differently in respect to employment than he would have been had he been a member of petitioner, in violation of Section 8(b)(2) and (1)(A) of the Act.[7]

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[6] Although petitioner suggests that Reinero was denied a permit because he had not performed his duties as an apprentice (Pet. 17), the Board found that the Company was merely informed that he could not be retained because he lacked a work permit (J.A. 94-95).

[7] Section 8(b)(2) makes it unlawful for a union to cause "an employer to discriminate against an employee in violation of [Section 8(a)(3)]." Section 8(a)(3), in turn, makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment * * * to encourage or discourage

Nor does the decision of the court below conflict with *Local 357, Teamsters* v. *National Labor Relations Board*, 365 U.S. 667, as contended by petitioner (Pet. 15). *Local 357* merely holds that a hiring-hall arrangement, under which the employer has delegated to the union exclusive control over referrals for employment, is not *per se* violative of the Act. In so holding, this Court specifically recognized that such an arrangement would be unlawful where the union had exercised its referral power in a discriminatory manner (365 U.S. at 676-677).[8] Here, as shown, the Union acted discriminatorily in refusing to renew Reinero's work permit.

2. There is likewise no substance to petitioner's contention (Pet. 8-15) that it was denied the right to be represented by counsel at the hearing before the trial examiner. Although petitioner was represented by its business agent, John Foreman, the court below noted (Pet. App. A3) that the "complaint apprised the Local of the nature of the proceedings," and that

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membership in any labor organization." Section 8(b)(1)(A) makes it unlawful for a union "to restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7," which includes the right "to form, join, or assist labor organizations" and the right "to refrain from any or all of such activities."

[8] There was concededly no proof of actual discrimination in *Local 357*. As the Court noted (365 U.S. at 675): "The only complaint in the case was by Slater, a union member, who sought to circumvent the hiring-hall agreement. When an employer and the union enforce the agreement against union members, we cannot say without more that either indulges in the kind of discrimination to which the Act is addressed."

there is "nothing whatever to indicate the Local was not aware of their nature and possible consequences,[9] or of its right to be represented by counsel as provided in the Board's Rules and Regulations." [10] Moreover, as the court further noted (*ibid.*):

> At the opening of the hearing the Trial Examiner asked counsel and "other representatives for the parties" to state their names. For the Local, its Business Agent answered, "We have none." The Trial Examiner asked, "You have no counsel?" The Business Agent responded, "Right, we do not have counsel." Then the Trial Examiner inquired: "And you, sir, are the representative?" The Business Agent answered, "I am." [J.A. 3-4.]

In these circumstances, as the court below correctly found (*ibid.*), "[t]here was no denial of the right to counsel, rather a choice of the Local to be represented by its Business Agent, as was also its right." [11]

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[9] Foreman had at least 15 years' experience on petitioner's bargaining committee and was well aware that the Brotherhood's work permit requirements had previously exposed it to legal difficulties (J.A. 36, 40).

[10] Section 102.38 of those rules and regulations (29 C.F.R. 102.88) provides: "Any party shall have the right to appear at such hearing in person, by counsel, or by other representative * * *." The complaint also specifically stated that petitioner had "the right to appear in person, or otherwise, and give testimony" (J.A. 53).

[11] Petitioner has been represented by counsel since the trial examiner issued his decision, even at the stage when exceptions were filed to that decision with the Board.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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